

PAUL S. PADDA, ESQ. (NV Bar #10417)  
 email: psp@paulpaddalaw.com  
**PAUL PADDA LAW, PLLC**  
 4560 South Decatur Boulevard, Suite 300  
 Las Vegas, Nevada 89103  
 Tele: (702) 366-1888  
 Fax: (702) 366-1940

DOUGLAS Q. HAHN (*admitted pro hac vice*)  
 email: dhahn@sycr.com  
**STRADLING YOCCA CARLSON & RAUTH, P.C.**  
 660 Newport Center Drive, Suite 1600  
 Newport Beach, California 92660  
 Tel: (949) 725-4000  
 Fax: (949) 725-4100

Attorneys for Defendant and  
 Counterclaim-Plaintiff Yuneec USA, Inc.

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

SUNDANCE MEDIA GROUP, LLC,  
  
 Plaintiff,  
  
 vs.

YUNEEC USA, INC., Does I through X  
 and Roe Corporations I through X  
 Inclusive,  
  
 Defendant.

CASE NO. 2:18-cv-00388-APG-BNW

Hon. Andrew P. Gordon

**DEFENDANT YUNEEC USA, INC.'S  
 OPPOSITION TO PLAINTIFF'S MOTION  
 FOR SUMMARY JUDGMENT**

Complaint Filed: March 2, 2018

YUNEEC USA, INC.,  
  
 Counterclaim-  
 Plaintiff,  
  
 vs.  
  
 SUNDANCE MEDIA GROUP, LLC,  
  
 Counterclaim-  
 Defendant.

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1                   **OPPOSITION TO PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

2                   Defendant and Counterclaim-Plaintiff Yuneec USA, Inc. (“Yuneec”), by and through its  
3 attorneys of record, hereby respectfully submits this opposition to Plaintiff Sundance Media  
4 Group, LLC’s (“SMG”) motion for summary judgment. Nothing in SMG’s Motion (ECF No.  
5 58) (“Mot.”) shows SMG is entitled to judgment as a matter of law. To the contrary and as set  
6 forth in Yuneec’s pending Motion for Summary Judgment, the following key material facts are  
7 undisputed, require the denial of SMG’s instant motion and entitle *Yuneec* to judgment as a  
8 matter of law on SMG’s claims:

9                   First, SMG cannot demonstrate its entitlement to summary judgment because its  
10 copyright deposit materials were not produced with the complaint or at any time during  
11 discovery. In fact, they still have not been produced or even attached to SMG’s Motion. No  
12 amount of hand waiving can change this. These images are critical to SMG’s claims and despite  
13 being in SMG’s control are still not before the Court and, consequently, the record is insufficient  
14 to establish the “copying” element required to show “substantial similarity” of SMG’s allegedly  
15 copyrighted work and the accused infringing materials. *See Seiler v. Lucasfilm, Ltd.*, 808 F.2d  
16 1316, 1319 (9th Cir. 1986). This issue is alone dispositive and dooms SMG’s claims.

17                   Second, contrary to SMG’s apparent purpose, SMG’s declarations submitted from former  
18 Yuneec employees and Jennifer Pidgen demonstrate even more clearly that Yuneec enjoyed an  
19 irrevocable license to use SMG’s images allegedly covered by this copyright registration.  
20 SMG’s protestation that it desired a “formal” agreement to be subsequently executed<sup>1</sup> is both  
21 irrelevant to the express license’s effectiveness and belied by the record evidence  
22 contemporaneous with Ms. Pidgen’s grant of the license. Yuneec’s one-year, paid up license to  
23 the SMG images naturally expired under its express terms, and Yuneec cannot, as a matter of  
24 law, be liable for copyright infringement during this period. (Mot. Summ. J., ECF No. 55, Ex. 1,  
25 PLTF001-002 & SMUF, ¶¶1-4.)

26  
27  
28                   <sup>1</sup> See Mot., ECF. No. 58 at Statement of Facts (“SOF”) ¶¶ 3, 9-11.

1 **I. STATEMENT OF MATERIAL UNDISPUTED FACTS<sup>2</sup>**

2 1. In November 2016, Yuneec and SMG negotiated for Yuneec to begin using  
3 certain media relating to the video and images of Yuneec's H520 and H920 drone models  
4 allegedly owned by SMG. (Ex. 1, PLTF001.)<sup>3</sup>

5 2. In June 2017, Michael Kahn (CEO, Yuneec USA) exchanged correspondence  
6 with Jennifer Pidgen (Owner of SMG) to clarify the terms of use for the SMG images. Ms.  
7 Pidgen responded by email that "Yuneec has a license to use the images" giving "full  
8 permissions to the Yuneec global marketing team to access and download the images." (Ex. 1,  
9 PLTF001-002.)

10 3. Mr. Kahn followed up to request clarity on whether there were any limitations on  
11 Yuneec's usage of the provided media. (Ex. 1, PLTF001-002.)

12 4. On June 21, 2017, Ms. Pidgen indicated that "usage is unlimited and non-  
13 exclusive for up to 1-year from today. This is to include images, video and any audio that we  
14 share with you." (Ex. 1, PLTF001-002.)

15 5. The license was supported by consideration, "[b]ottom line, I don't expect  
16 Yuneec to pay for use as I believe in our mutually beneficial relationship. **Yuneec enjoys the  
17 benefit of our images and we have access to the newest products from Yuneec to showcase  
18 to our clientele.**" (Ex. 1, PLTF001-002) (emphasis added.)

19 6. Ms. Pidgen stated SMG's policy relating to sharing such photos in this same  
20 email, "We are happy to share our photos within the industry, no different than we are sharing  
21 them with some of our clients that we've worked for. When/where possible our request is that we  
22 have a nod for the photos shared." (Ex. 1, PLTF001-002.)

23 7. On December 12, 2017, Ms. Pidgen sent an email purporting to terminate the  
24 agreement and demanding that Yuneec either remove all SMG content within 15 days or execute

25  
26  
27 <sup>2</sup> ("SMUF"). Yuneec's accompanying Response to Plaintiff's Statement of Facts is attached  
28 hereto.

<sup>3</sup> Unless otherwise indicated, all Exhibits refer to the exhibits annexed to Plaintiff's Motion.

1 a formal licensing agreement along with a \$90,000 payment to SMG. (Ex. 2, PLTF003; Hahn  
2 Decl., Ex. 1, Pl.'s Initial Disclosures at PLTF003-009.)

3 8. SMG asserts that Yuneec has been on notice that it does not have license or  
4 authority to publish, use or distribute SMG's images as of January 5, 2018. (Dkt. No. 1, Compl.  
5 ¶¶ 35-37.)

6 9. SMG asserts that Yuneec has infringed its copyright through its allegedly  
7 unauthorized use of certain images. (Compl., ¶¶ 42-43.)

8 10. SMG registered certain unidentified photographs as an unpublished collection  
9 with the United States Copyright Office, under Registration Number VAu 1-301-707. (Request  
10 for Judicial Notice ("RJN"), ECF No. 55-8.) The effective date of registration is January 18,  
11 2018. (*Id.*) The author listed on the registration is Jennifer Pidgen, SMG's managing member.  
12 (*Id.*)

13 11. Plaintiff did not produce either the copyright registration or the deposit materials  
14 allegedly protected by SMG's copyright registration with its Complaint.

15 12. On December 26, 2018, the Court issued an Amended Discovery Plan (Dkt. No.  
16 38). The Amended Discovery Plan required the parties to exchange initial disclosure by January  
17 14, 2019, disclose experts by April 26, 2019 and complete fact discovery by June 19, 2019.

18 13. SMG did not produce initial disclosures on January 14, 2019; it did not disclose  
19 any experts by April 26, 2019; it noticed no depositions in this case and until May 3, 2019 it  
20 served no written discovery.

21 14. On June 19, 2019, SMG placed in the mail its Initial Disclosures and attached  
22 approximately 200 pages of documents to these disclosures. (*See* Declaration of Douglas Hahn  
23 ("Hahn Decl."), Ex. 1, Plaintiff's Initial Disclosures and Document Production, PLTF001-  
24 00196.)

25 15. The documents produced with the Initial Disclosures did not include SMG's  
26 copyright registration, the copyright deposit material, or document sufficient to show SMG's  
27 actual damages.

1           16.     At no point during the pendency of this matter has SMG produced either the  
2     copyright registration or the deposit materials allegedly protected by SMG's copyright  
3     registration. (Hahn Decl., Ex. 1.)

## 4 5     **II.     BACKGROUND AND PROCEDURAL HISTORY**

6           In November 2016, Yuneec and SMG negotiated for Yuneec to begin using certain media  
7     relating to the video and images of Yuneec's H520 and H920 drone models allegedly owned by  
8     SMG. (SMUF, ¶1.) In June 2017, Michael Kahn (CEO, Yuneec USA) reached out to Jennifer  
9     Pidgen (Owner of SMG) for clarification on the terms of use for the SMG images. (SMUF, ¶2.)  
10    Ms. Pidgen responded by email that "Yuneec has a license to use the images" giving "full  
11    permissions to the Yuneec global marketing team to access and download the images." (Ex. 1,  
12    PLTF001-002; SMUF, ¶2.) Mr. Kahn followed up to request clarity on whether there were any  
13    limitations on Yuneec's usage of the provided media. (*Id.*; SMUF, ¶3) On June 21, 2017, Ms.  
14    Pidgen indicated that "usage is unlimited and non-exclusive for up to 1-year from today. This is  
15    to include images, video and any audio that we share with you." (*Id.*; SMUF, ¶4.) The license  
16    was also supported by consideration, "[b]ottom line, I don't expect Yuneec to pay for use as I  
17    believe in our mutually beneficial relationship. Yuneec enjoys the benefit of our images and we  
18    have access to the newest products from Yuneec to showcase to our clientele." (*Id.*; SMUF, ¶5.)

19           Ms. Pidgen stated SMG's policy relating to sharing such photos in this same email, "We  
20    are happy to share our photos within the industry, no different than we are sharing them with  
21    some of our clients that we've worked for. When/where possible our request is that we have a  
22    nod for the photos shared." (*Id.*; SMUF, ¶6.)

23           In Dec. 2017 and despite the one year license, Ms. Pidgen sent an email purporting to  
24    terminate the parties' agreement and demanding that Yuneec either remove all SMG content  
25    within 15 days or execute a formal licensing agreement along with a \$90,000 payment to SMG.  
26    (Ex. 2, PLTF003; Hahn Decl., Ex. 1, Pl.'s Initial Disclosures at PLTF003-009; SMUF, ¶7.)

27           On March 2, 2018, SMG filed its Complaint for "Direct Copyright Infringement" and  
28



1 “Contributory Copyright Infringement.” (Dkt. No. 1.) In that Complaint, SMG asserts that  
 2 Yuneec has infringed its copyright through its allegedly unauthorized use of certain images. (*Id.*,  
 3 ¶¶ 42-43; SMUF, ¶9.) Those images, however, are not identified in the Complaint. SMG also  
 4 asserts that Yuneec has been on notice that it does not have license or authority to publish, use or  
 5 distribute SMG’s images as of January 5, 2018. (*Id.*, ¶¶ 35-37; SMUF, ¶8.)

6 SMG allegedly registered certain unidentified photographs as an unpublished collection  
 7 with the United States Copyright Office, under Registration Number V Au 1-301-707. (*Id.*, ¶ 6;  
 8 SMUF, ¶10; RJN, ECF No. 55-8.) The effective date of registration is January 18, 2018. (*Id.*)  
 9 The author listed on the registration is Jennifer Pidgen, SMG’s managing member. (*Id.*) Plaintiff  
 10 did not attach either the copyright registration or the deposit materials allegedly protected by  
 11 SMG’s copyright registration to its Complaint. (*See id.*; SMUF, ¶11.)

12 SMG did not produce Initial Disclosures on January 14, 2019 and when it did so on June  
 13 19, 2019, it once again failed to produce the alleged deposit material for its copyright  
 14 registration. (SMUF, ¶¶13, 15) Indeed, to date, including with its Motion for Summary  
 15 Judgment, SMG has not provided Yuneec **or the Court** with the deposit material that it allegedly  
 16 filed with the Copyright Office. (SMUF, ¶16) Without that deposit material, there is no way to  
 17 know what SMG’s alleged copyright covers or determine if the images allegedly used by Yuneec  
 18 are substantially similar. SMG’s failure to produce the necessary elements of its case, requires  
 19 denial of SMG’s instant motion as set forth below.

### 20 **III. ARGUMENT**

#### 21 **A. Legal Standards**

22 Summary judgment is only appropriate “if the movant shows that there is no genuine  
 23 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.  
 24 R. Civ. P. 56(a). “The party seeking summary judgment bears the initial burden of informing the  
 25 court of the basis for its motion and identifying those portions of the record that demonstrate the  
 26 absence of a genuine issue of material fact.” *Douglas v. Dreamdealers USA, LLC*, No. 2:17-cv-  
 27 02134-APG-BNW, 2019 U.S. Dist. LEXIS 162844, at \*10 (D. Nev. Sep. 24, 2019) (citing  
 28

1 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). “When the moving party also bears the  
 2 burden of persuasion at trial, to prevail on summary judgment it must show that ‘the evidence is  
 3 so powerful that no reasonable jury would be free to disbelieve it.’” *Shakur v. Schriro*, 514 F.3d  
 4 878, 890 (9th Cir. 2008) (quoting 11-56 Moore’s Federal Practice - Civil § 56.13). Only if the  
 5 moving party meets its burden does the “burden then shift[] to the non-moving party to set forth  
 6 specific facts demonstrating there is a genuine issue of material fact for trial.” *Douglas*, 2019  
 7 U.S. Dist. LEXIS 162844, at \*10 (citing *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528,  
 8 531 (9th Cir. 2000)). The Court “view[s] the evidence and reasonable inferences in the light  
 9 most favorable to the non-moving party.” *Id.* (citing *James River Ins. Co. v. Hebert Schenk*,  
 10 *P.C.*, 523 F.3d 915, 920 (9th Cir. 2008)).

11 For a Copyright claim, “[t]o establish infringement, two elements must be proven: (1)  
 12 ownership of a valid copyright, and (2) copying of constituent elements of the work that are  
 13 original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Further, a  
 14 registration of a copyright by the Copyright office is required to file suit. *Fourth Estate Pub.*  
 15 *Ben. Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 886 (2019) (“We hold . . . that registration  
 16 occurs, and a copyright claimant may commence an infringement suit, when the Copyright  
 17 Office registers a copyright.”).

18 **IV. SMG IS NOT ENTITLED TO SUMMARY JUDGMENT OF DIRECT AND**  
 19 **CONTRIBUTORY COPYRIGHT INFRINGEMENT BECAUSE ITS**  
 20 **COPYRIGHT DEPOSIT MATERIALS REMAIN CONSPICUOUSLY ABSENT**  
 21 **FROM THE RECORD**

22 SMG’s Motion requests summary judgment that Yuneec directly and contributorily  
 23 infringed its copyright, but it lacks record evidence to establish an essential element of its claim  
 24 – copying. “To establish infringement, two elements must be proven: (1) ownership of a valid  
 25 copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns*,  
 26 *Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). The “copying” element requires SMG to  
 27  
 28

1 show “substantial similarity” of SMG’s allegedly copyrighted work and the allegedly infringing  
2 materials. *See Seiler*, 808 F.2d at 1319.

3 Notably, in response to Yuneec’s co-pending cross motion for summary judgment (ECF  
4 No. 55), SMG did not dispute that it has failed to produce the deposit materials allegedly  
5 protected by its copyright registration. Yuneec’s Statement of Material Undisputed Fact  
6 (“SMUF”) No. 11 asserts:

7 Plaintiff did not produce either the copyright registration or the  
8 deposit materials allegedly protected by SMG’s copyright  
registration with its Complaint.

9 (SMUF No. 11, ECF No. 55-7.) While SMG does not dispute these material facts, it has  
10 countered that the 35 images allegedly infringed by Yuneec were somehow “incorporated in by  
11 reference” to the Complaint:

12 The registration was noted in paragraph 6 of the Complaint which  
13 was incorporated by reference. **Paragraph 6 states that 35 images**  
14 **were registered, which were also incorporated in by reference.**  
15 See also footnote 4 and Declaration of Jennifer Pidgen, ¶25. SMG  
also sought in discovery for any images used by Yuneec to be  
produced, which it has failed to respond.

16 (Opp., Exc. No. 59 at 12) (emphasis added.) These images are neither attached to the Complaint,  
17 identified in SMG’s “initial disclosures,” included in its document production, or otherwise  
18 attached to its briefing on these cross motions for summary judgment despite its obligations to  
19 identify and produce documents that “support its claims.” Fed. R. Civ. P. 26(a)(ii).

20 Simply put, there is no way for the Court to know what was actually filed with SMG’s  
21 copyright application and, thus, what exactly is covered by that registration. Indeed, the images  
22 that SMG claims rights in are all images of Yuneec’s products. Thus, absent and express  
23 identification of the specific images registered, Yuneec is likewise left to speculate which images  
24 of its own products allegedly infringe SMG rights. This failure leaves the evidentiary record  
25 devoid of proof on an essential element of SMG’s claim. The Ninth Circuit has stated that when  
26 the contents of a plaintiff’s work are at issue, “the contents are material and *must be proved.*”  
27 *Seiler*, 808 F.2d at 1319 (emphasis added). To do so, the court held that the copyright owner  
28 “must either produce the original or show that it is unavailable through no fault of his own.” *Id.*

Thus, without placing this fundamental element of SMG's proof into evidence, "[t]here can be no proof of 'substantial similarity' and thus of copyright infringement." *See id.* at 1317, 1319 ("With no admissible evidence, Seiler then lost at summary judgment."); *Alaska Stock, LLC v. Pearson Educ., Inc.*, 975 F. Supp. 2d 1027, 1039-40 (D. Alaska 2013) ("[T]he certificates of registration in this case do not provide the details necessary to confirm that the image or images relating to Alaska Stock's claims are the same images underlying the certificates of registration."); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1114-15 (W.D. Wash. 2004) ("The only way to determine with any certainty whether [the registration certificate] covered the [photo] [wa]s to review the deposits included with the registration applications." Without the deposits, the court concluded that the plaintiff "c[ould] not show that the [photo] [wa]s among the photographs covered by [the] [r]egistration[s]."); *see also Lanard Toys Ltd. v. Novelty, Inc.*, No. 05-cv-8406-CAS, 2006 U.S. Dist. LEXIS 96703, at \*19-23 (C.D. Cal. Mar. 17, 2006) (The court held that without the deposit material, certificates of registration, even when combined with the declaration of the plaintiff, were insufficient evidence of ownership.); *ABRO Indus. v. INEW Trade, Inc.*, No. 3:14-CV-1984-TLS, 2017 U.S. Dist. LEXIS 179792, at \*16-18 (N.D. Ind. Oct. 30, 2017) ("In light of ABRO's failure to produce any deposit materials that would aid the Court in confirming the scope of the registrations" the court refused to grant a presumption of copyright validity.).

Yuneeec anticipates that SMG will attempt to escape this fatal flaw by arguing – as it has in response to Yuneeec's motion for summary judgment, that it should be excused from having produced the underlying work before the close of fact discovery – or at all. (*See* Pl.'s Opp., Exc. No. 59, at 16-17.) However, in order to prevail, SMG must produce the deposit materials into evidence because "a photograph whose contents are sought to be proved, as in copyright . . . [is] . . . covered by the best evidence rule." *Seiler*, 808 F.2d at 1320. Consistent with Ninth Circuit precedent, SMG must produce the actual copyright deposit materials, or certified copies of them, into evidence. Indeed, courts have awarded attorneys' fees where a plaintiff could not substantiate a frivolous claim for copyright infringement because it never obtained or produced the copyright deposit materials. *See Nat'l Bus. Dev. Servs. v. Am. Credit Educ. & Consulting*,

1 *Inc.*, No. 07-11140, 2007 U.S. Dist. LEXIS 92994, at \*8 (E.D. Mich. Dec. 19, 2007) (deeming  
 2 an award of attorneys' fees appropriate and noting that "[a] cursory examination of Plaintiff's  
 3 approach to filing its claim . . . reveals that the claim was frivolous, unreasonable, and deserving  
 4 of deterrent action."').<sup>4</sup>

5 As such, SMG is left with no excuse for having failed to produce the underlying images  
 6 allegedly covered by its copyright registration. The Copyright office may have granted SMG a  
 7 registration, but SMG's failure to produce the underlying works protected by registration has left  
 8 both Yuneec and this Court to guess at the scope of SMG's alleged rights. These images are  
 9 uniquely within SMG's control, and its failure to produce them is inexcusable and fatal. As  
 10 SMG cannot establish the content of its alleged copyright based on the present record and, thus,  
 11 cannot establish the required element of substantial similarity<sup>5</sup>, SMG is not entitled to judgment

12  
 13 <sup>4</sup> Yuneec notes that in opposition to Yuneec's summary judgment motion, SMG makes two  
 14 arguments for why its failure to produce the deposit materials is not fatal: (1) the images  
 15 deposited with the Copyright Office were supposedly "incorporated in by reference" to the  
 16 Complaint; and (2) "Judicial notice may be taken at any stage in the preceding, whether by the  
 17 Court on its own or if requested and the Court is supplied with the information." (*See Opp.*, Exc.  
 18 No. 59, at 12, 17.) Taken together, SMG's position is that it need not ever produce the  
 19 underlying work and even if it must, could do so at any time. SMG's position stands in stark  
 20 contrast to established law. In *Seiler*, for instance, the Ninth Circuit affirmed the district court's  
 21 grant of summary judgment against plaintiff following a seven day hearing on the admissibility  
 22 of the plaintiff's "reconstructions." *Seiler*, 808 F.2d at 1317-18 ("With no admissible evidence,  
 23 *Seiler* then lost at summary judgment."). In *Warner Brothers*, introduced some but not all of the  
 24 underlying works protected by its copyright registrations into evidence. *See Warner Bros.*  
 25 *Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 518-19 (S.D.N.Y. 2008). As a result, the Court  
 26 held that "Plaintiffs cannot establish infringement of these works . . . because neither work was  
 27 entered into evidence, and they are not before the Court." *Id.* at 534 & n. 12. The court was  
 28 clear in drawing a distinction between judicial notice, which it took of the copyright registrations  
 to establish ownership of these works, and the plaintiffs' failure to introduce the "underlying  
 works" into evidence, which precluded a finding of infringement. *Id.* SMG fails to point to a  
 single case to support its implicit argument that it may ambush Yuneec with its copyright deposit  
 material when and if it pleases.

<sup>5</sup> Further, SMG has failed to establish infringement based on the record before the Court. SMG  
 has not identified any of Yuneec's alleged infringing uses, except in the abstract. This would  
 again leave both Yuneec and the Court to guess at which images of Yuneec's products SMG  
 claims to infringe their rights. Further, there is no way for any trier of fact to assess the  
 similarity between the protected image and the allegedly infringing image, when the allegedly  
 infringing image is not identified with particularity. SMG's hand waiving and unspecified claims  
 of "infringement" are insufficient to carry its burden. Finally, even the affidavits of David  
 Morris (Mot., ECF. No. 58-17) and Michael Kahn (Mot., ECF. No. 58-18) do little more than  
 make equivocal statements not knowing how or how many images were used, if any. This

1 as a matter of law on its claim for direct or contributory copyright infringement and its motion  
2 must be denied.

3 **V. YUNEEC HAD AN ENFORCEABLE LICENSE TO USE SMG'S ALLEGEDLY**  
4 **COPYRIGHTED IMAGES**

5 SMG's Motion for Summary Judgment must be denied because it gave Yuneec a written  
6 license to use the alleged works. This, at a minimum, raises a genuine issue of material facts as  
7 to SMG's claim of infringement.<sup>6</sup>

8 Here, as demonstrated by the undisputed record evidence, there was an offer by SMG  
9 with definite terms, supported by consideration, which was accepted by Yuneec. *Meritage*  
10 *Homes of Nev., Inc. v. FNBN-Rescon I, LLC*, 86 F. Supp. 3d 1130, 1139 (D. Nev. 2015) (citing  
11 *May v. Anderson*, 121 Nev. 668, 672 (2005) ("Basic contract principles require, for an  
12 enforceable contract, an offer and acceptance, meeting of the minds, and consideration."); *Aerial*  
13 *Lumber Co. v. United States*, 239 F.2d 906, 907 (9th Cir. 1956). A nonexclusive license  
14 supported by consideration "is a contract." *Asset Mktg. Sys. v. Gagnon*, 542 F.3d 748, 757 (9th  
15 Cir. 2008) (granting summary judgment of no infringement based on irrevocable nature of  
16 nonexclusive license).

17 SMG devotes a substantial portion of its argument to belated attacks on the license it  
18 granted to Yuneec in June 2017 but cannot refute the basic fact that the parties entered into a  
19 nonexclusive license with set terms for valid consideration. SMG reproduces the email  
20 communications between Ms. Pidgen and Yuneec employees in which she granted Yuneec a  
21 license to SMG's images, which unequivocally establish the fact of an agreement and its terms:

22 Hi Mike,

23 Douglas requested that I touch base with you regarding the SMG  
24 agreement for the images that we've provided to Yuneec for the  
H520 & H920. Our team consists primarily of myself, James Spear

25  
26 evidence is not sufficient for SMG to carry its burden, even if SMG had presented its deposit  
27 materials. On this record there is undoubtedly a genuine issue of material fact as to copying and  
28 similarity.

<sup>6</sup> Indeed, as the license grant is undisputed, actually supports Yuneec's pending Motion for  
Summary Judgment. (*See* Mot., ECF. No. 58 at Statement of Facts ("SOF") ¶¶9-10.)



1 & Luisa Winters and are typically captured during both Yuneec  
 2 excursions with Douglas and/or SMG events/client training. I  
 understand you are now looking to have an official ***Terms of***  
***License*** for the SMG images.

3 **Given my experience in licensing and purchase of stock media,**  
 4 **it's not appropriate for me to ask for those sorts of standards**  
 5 **which is why last November we agreed (Frank, Dave, DSE & I)**  
**to a casual agreement.** Much more affordable for Yuneec.

6 Bottom line, **I don't expect Yuneec to pay for use as I believe in**  
 7 **our mutually beneficial relationship. Yuneec enjoys the benefit**  
 8 **of our images and we have access to the newest products from**  
 9 **Yuneec to showcase to our clientele (which also happens to fall**  
 10 **within your key sales channels).** I feel that it's in everyone's best  
 interest to continue this positive relationship, given that SMG's  
 primary focus is on government & organization training and  
 consulting. We are happy to share our photos within the industry,  
 no different than we are sharing them with some of our clients that  
 we've worked for. When/where possible our request is that we  
 have a nod for the photos shared.

11 **To be clear, Yuneec has license to *use* the images,** but does not  
 12 *own* the images, nor would I be able to offer exclusivity. Our  
 13 clients (LEO, fire, government) also want to use the images to help  
 14 promote their new UAV programs within their organizations. That  
 said, if there are certain images that you would like to have and/or  
 require exclusivity, I am certain we can make arrangements for the  
 one-offs.

15 All of the content SMG has produced to a Google Drive area per  
 16 DSE's request since last November. This is primarily because DSE  
 17 has been unable to load the content directly to the Yuneec servers.  
 18 Instead **we've give full permissions to the Yuneec *global***  
 19 ***marketing team* to the access and download the images. This is**  
 20 **more efficient for the team as they are able to download and**  
**store images that they actually want to use in creating**  
**marketing assets. Douglas regularly informs the graphics**  
**teams around the globe when there are new assets for them to**  
**use.**

21 Mike - **I see no reason to complicate the arrangement. Yuneec**  
 22 **has the right to use anything we upload to the server that is**  
 23 **shared via various Yuneec email addresses.** I'm happy to join in  
 24 on a cigar outing or dinner from time to time in appreciation and I  
 know that Yuneec will continue to work with SMG on potential  
 training opportunities. (Thank you again for your support with our  
 incredibly successful workshops at NAB!)

25 Sundance Media Group is a proud supporter of the Yuneec brand.  
 26 We have had several opportunities to provide training quotes from  
 27 government agencies, and several of them have turned into Yuneec  
 28 sales opportunities via Kevin Jones, Thomas Reese, Westwind, and  
 TIG. We are currently involved in quotes for OSHA, US Marshals,  
 LVMPD, Las Vegas Fire, Palm Springs Fire, the US Air Force in  
 Maryland, and others and I am always working Yuneec into those

1 conversations. We are very appreciative of our involvement with  
2 Yuneec and look forward to working together.

3 **The only other expectation that I have is that this arrangement**  
4 **is clearly communicated to the entire marketing team.** I am  
5 happy to provide specific, stylized shots while we are in the field  
6 with our clients, we simply need the communication of the request.  
7 I'd like to believe that the majority of the marketing team respect  
8 the time and energy SMG puts into shooting, processing, and  
9 uploading images for them to use. I know that the disparaging  
10 comments floating about are not truly the Yuneec view, and that  
11 you and your team will manage it so that the rest of the marketing  
12 team is not poisoned by those discouraging and disrespectful  
13 comments.

14 (Mot., ECF No. 58-4, Ex. 1, PLTF001) (emphasis added.) In this correspondence Ms. Pidgen  
15 offered Yuneec a “license to use [SMG’s] images... [including] [a]ll of the content SMG has  
16 produced to a Google Drive.” (*Id.*) She further clarified that “**Yuneec has the right to use**  
17 **anything we upload to the server...**” (*Id.*) (emphasis added.) She also indicated that this was to  
18 be a non-exclusive licenses and the scope included “**full permissions to the Yuneec global**  
19 **marketing team to the access and download the images... to use in creating marketing**  
20 **assets.**” (*Id.*) (emphasis added.) The one-year term of the license was set by email the following  
21 day:

22 Good Morning Mike,

23 Given the lifespan of the products you build, I had not considered a  
24 time limit to usage. That said, **let's say that usage is unlimited**  
25 **and non-exclusive (unless specifically requested and**  
26 **negotiated) for up to 1 year from today. This is to include**  
27 **images, video and any audio that we share with you. We can**  
28 **revisit/renegotiate from there.**

Sound good?

Jennifer

(Mot., ECF No. 58-4, Ex. 1, PLTF002) (emphasis added.) This is undeniably an express  
communication offering Yuneec a license with definite terms.

Ms. Pidgen’s email above further indicates her belief that the license was supported by  
mutual consideration, “**Yuneec enjoys the benefit of our images and we have access to the**  
**newest products from Yuneec to showcase to our clientele.**” (Mot., ECF No. 58-4, Ex. 1,



1 PLTF001) (emphasis added.) Finally, Yuneec's former CEO, Michael Kahn, submitted a  
 2 declaration with SMG's Opposition indicating that the parties agreed to these terms set forth in  
 3 the emails above:

4 I wrote Ms. Pidgen and asked to be quoted for Yuneec to acquire  
 5 the rights for those images. I asked Ms. Pidgen if she would allow  
 6 Yuneec USA to use the images for a period of 12 months without  
 7 additional costs. She agreed and emailed me outlining her proposal  
 8 which I read and thought fair. I passed this email onto Frank  
 9 DeMartin to officially execute with SMG and considered the  
 10 matter closed.

11 (Decl. of Michael Kahn, Mot., ECF No. 58-18, Ex. 15.) This offer by SMG with definite terms,  
 12 supported by consideration, which was accepted by Yuneec created a license.

13 SMG focuses its argument on post hoc assertions that no "formal" agreement existed to  
 14 memorialize the license from SMG to Yuneec. (*See, e.g.*, Mot., ECF No. 58 at 13.) That a  
 15 formal agreement was not later "executed" has no impact on the enforceability of this agreement  
 16 and is in fact belied by Ms. Pidgen's refusal to provide "official ***Terms of License*** for the SMG  
 17 images" at Yuneec's request because "Given [her] experience in licensing and purchase of stock  
 18 media, it's not appropriate . . . to ask for those sorts of standards." (Mot., ECF No. 58-4, Ex. 1,  
 19 PLTF001) (emphasis in original.) She preferred not "to complicate the arrangement" and  
 20 stressed that "Yuneec has the right to use anything we upload to the server that is shared via  
 21 various Yuneec email addresses." (*Id.*) SMG thus fails to carry its burden in establishing its  
 22 alleged material fact that no license existed between the parties. The evidence contradicts this  
 23 assertion and at the minimum there is a clear dispute on this material fact, such that the Court  
 24 should deny SMG's request for summary judgement.

25 Further, to the extent SMG now disputes Yuneec's eventual performance of the license  
 26 covenants, it does not vitiate the fact that the license was supported by consideration and  
 27 enforceable:

28 A promise usually is consideration for a return promise. This has  
 been true for at least four centuries, ever since bilateral contracts  
 were recognized. In other words, in a bilateral contract, where a  
 promise is exchanged for a promise, each promise is the  
 consideration for the other promise.

2 CORBIN ON CONTRACTS § 5.25 (2019). Because it was supported by consideration, SMG’s license to Yuneec was therefore irrevocable. (*See* Mot., ECF No. 58-4, Ex. 1, PLTF001) (“Yuneec enjoys the benefit of our images and we have access to the newest products from Yuneec to showcase to our clientele”); *see also* *Asset Mktg. Sys.*, 542 F.3d at 757 (“If an implied license accompanied by consideration were revocable at will, the contract would be illusory.”) (quoting *Lulirama Ltd., Inc. v. Axxess Broad. Servs., Inc.*, 128 F.3d 872, 882-83 (5th Cir. 1997)). SMG’s arguments, if anything, go to performance of the contract, not its enforceability. *See, e.g.*, 2 CORBIN ON CONTRACTS § 5.20 (2019). SMG’s infringement claims against Yuneec that accrued during the license period are thus barred. *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 956 (11th Cir. 2009) (recognizing that a “copyright owner waives [her] right to sue for copyright infringement while the nonexclusive license is in effect”); *accord* *Asset Mktg. Sys.*, 542 F.3d at 757.

SMG also devotes three sentences at the end of its opening brief to allege that Yuneec has exceeded the bounds of the initial license by providing the SMG images to third-parties. But its argument is nonsensical as it cites to “consent to Transmedia and Broadcaster Defendants continued use of the Software, because Defendant Adams informed his attorney to negotiate for the Software use.” Neither Transmedia, Broadcaster Defendants, or Defendant Adams are in this matter nor does this matter involve the use of Software. Regardless of the error, SMG’s argument still fails. SMG granted to Yuneec “**full permissions to the Yuneec global marketing team to the access and download the images... to use in creating marketing assets.**” (Mot., ECF No. 58-4, Ex. 1, PLTF001) (emphasis added.) “[M]arketing assets” would include media kits to distributors and resellers to help promote Yuneec’s products.

As set forth above, despite SMG’s claims, its written grant of a copyright license creates, at a minimum, a genuine question of material fact on its claims of copyright infringement requiring the denial of its instant motion.

## VI. CONCLUSION

For the foregoing reasons, Yuneec respectfully submits that SMG is not entitled to summary judgment on its claims.

1  
2 DATED: December 4, 2019

PAUL PADDA LAW, PLLC  
4560 South Decatur Boulevard, Suite 300  
Las Vegas, Nevada 89103

3  
4 STRADLING YOCCA CARLSON &  
RAUTH, P.C.  
5 660 Newport Center Drive, Suite 1600  
Newport Beach, California 92660

6  
7 By: /s/ Douglas Q. Hahn  
Douglas Q. Hahn  
8 (admitted *pro hac vice*)

9 Attorneys for Defendant /  
Counterclaim-Plaintiff  
10 Yuneec USA, Inc.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day, December 4, 2019, a true and correct copy of the foregoing document was served by e-service via the Court’s electronic filing system (CM/ECF) upon all parties in the action.

/s/ Douglas Q. Hahn